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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]124

JUANITA DALE PHILLIPS,

Petitioner,

vs.

THE STATE OF TEXAS.

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
JOE TONAHILL,
Tonahill Building,
Jasper, Texas,
MELVIN BELLI,
240 Stockton Street,
San Francisco, California,
JULIUS LUCIUS ECHELES,
33 North La Salle,
Chicago 2, Illinois,
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

JUANITA DALE PHILLIPS,

Petitioner,

vs.

THE STATE OF TEXAS.

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas.

Petitioner, Juanita Dale Phillips, respectfully prays for a Writ of Certiorari to the Court of Criminal Appeals of Texas in order to review its judgment affirming a judgment of The Criminal District Court No. 3 of Dallas County, Texas, adjudging petitioner guilty of possession of marijuana and sentencing her to fifteen years imprisonment.

Opinions Below.

The trial court delivered no written opinion upon the rendering of judgment [Tr. 84][1] nor at time of sentencing [Tr. 118].[2]

There are two opinions in the court below, a majority and a dissent, the court dividing 2 to 1. The opinions are not yet reported. They appear in the record at R. 622 and 628. They are set forth hereinafter as Appendix A hereto. No opinions were written on the denial of rehearing [R. 669].

The judgment of the Court below is the last paragraph of the majority opinion: "The judgment is affirmed." (Appx. A, 5).[3]

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[1]The exact pagination of the certified record by the clerk of the court below is not known to counsel. The record consists of: Transcript of Record containing the formal papers and legal documents from the trial court to the appellate court, herein referred to as Tr.; Statement of Facts, Hearing on Motion for Change of Venue, herein referred to as SFV; Statement of Facts, Hearing on Motion for Continuance, herein referred to as SFC; Statement of Facts, being the transcript of the testimony, herein referred to as SF; Statement of Facts, Hearing on Motion for New Trial, herein referred to as SFNT. The remaining portions of the record certified to this Court consist of sundry other documents, such as the opinions in the court below, briefs of counsel, motions for rehearing and for stay of mandate, order staying mandate, minutes of court, etc. These latter documents will be referred to by their names, or, where known, by reference to the pagination by the clerk below as R. ... (Counsel have a copy of the Index to the record certified to this Court, but the pages do not exactly coincide with the copies of the documents they have.)

[2]Under Texas procedure, apparently, the jury fixes punishment right at the time it adjudges guilt or innocence, without benefit of evidence or a probation report bearing on the question of sentence [Tr. 81, 83-84]. The unconscionable severity of the sentence for mere possession of marijuana, there being no evidence of any prior convictions nor any charge of using or selling, may be accounted for by this procedure, taken in the light of the unfavorable characterization of petitioner in the public press (SFV 2, 14).

[3]There is also a document in the record at R. 682 denominated "Judgment" signed by the clerk of the court below. It is set out hereinafter as Appendix B.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is January 14, 1959 [R. 682; Appx. A, 5].

2. The date of the order denying motion for rehearing is February 18, 1959 [R. 669, 682; Appx. B]. A second motion for rehearing was sought to be filed on February 19, 1959 but was not permitted [R. 671, 682; Appx. B].

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 USC 1257(3) and Rule 22(1) of this Court.

Execution of judgment has been stayed pending disposition of this petition (or appeal) by this Court [R. 680].

Questions Presented for Review.

1. Does Section 16 of the Uniform Narcotics Control Act (Vernon's Texas Penal Code, §16 of Art. 725b) on its face, or as construed and applied to allow the issuance of a search warrant on information and belief without requiring and without there having been the setting forth of any facts reflecting the basis for such belief, violate the right to privacy guarantee of the due process clause of the Fourteenth Amendment?

2. Where a State, by statute, follows the "exclusionary rule" as to the admissibility of illegally obtained evidence and specifically provides that evidence obtained in violation of the United States Constitution is inadmissible, do the decisions of this Court as to whether evidence is obtained in violation of the Fourth Amendment control on the question of whether the evidence is illegally obtained, or

may a State, consistent with the right of privacy guarantee of the due process clause of the Fourteenth Amendment, hold to be not violative of the United States Constitution police conduct which this Court has said is violative thereof?

3. Where a search warrant, issued on the basis of a police officer's affidavit on information and belief that marijuana is then concealed on the premises by the defendant, commands the police officer to forthwith search the premises described and to arrest the defendant, and the police officers, instead of so doing, keep the premises under surveillance and do not execute the warrant until 36 hours later when a person, known to the police officers not to be the person described in the warrant, enters the premises, is the defendant, under the due process clause of the Fourteenth Amendment, entitled to know the name of the informer not named in the affidavit but stated therein as being the basis for the officer's belief?

Constitutional Provisions and Statutes Involved.

Section 16 of Vernon's Texas Penal Code, Art. 725(b) (Acts 1937, 45th Leg., p. 333, ch. 169; Acts 1941, 47th Leg., p. 647, ch. 392, §§1, 2) is lengthy. It is set out in full in Appendix C. The pertinent part reads:

> "Whenever any officers or employee of the Department of Public Safety or any peace officer who has authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint

to such effect before any magistrate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. . . ."

Article 727a, Vernon's Texas Code of Criminal Procedure (Acts 1925, p. 186, 39th Leg., ch. 49, §1; Acts 1929, 41st Leg., 2nd C. S. p. 79, ch. 45, §1; as amended Acts 1953, 53rd Leg., p. 669, ch. 253, §1) provides:

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . No State shall . . . deprive any person of life, liberty or property, without due process of law; . . ."

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

How the Federal Questions Were Raised.

A. In the Trial Court.

Prior to trial, so far as pertinent here, petitioner filed two motions to dismiss the indictment [Tr. 6, 30], a motion for disclosure of name of informant [Tr. 13], an amended motion for disclosure [Tr. 17], a motion to suppress evidence [Tr. 41], and an application for continuance [Tr. 48]. In these motions, petitioner raised the points that: the indictment is based upon illegally obtained evidence for the reason that nowhere on the face of the affidavit for the warrant is any probable cause shown to exist, nor any facts set out to show probable cause, nor what representations were made by the informer or informers from which probable cause might be determined [Tr. 7-8, 30-32]; that the name of the informer or informants is necessary before defendant can safely go to trial for the reasons that one of her defenses was entrapment and to show that there was no probable cause for the issuance of the warrant and so that she may get a fair trial [Tr. 14-15, 18-24]; that evidence was illegally obtained by use of wire tapping and divulged contrary to 47 USC 605 [Tr. 41, 44]; that because of the refusal of the prosecution and the court to divulge the name of the informant [Tr. 49], and the denial of the motion to suppress evidence obtained by wire tapping [Tr. 50], additional time was needed to prepare defendant's case. All of these motions were overruled [Tr. 16, 24, 32, 45, 52].

At the outset of the trial, as the prosecution was putting on evidence of entry into petitioner's apartment by authority of a search warrant, petitioner objected (SF 8) "to anything that takes place on the basis of some search

warrant or entry into her apartment house. We object to the search warrant and to its legality based upon the affidavit which it was based upon. . . . . We are objecting to any evidence that might be brought out against this defendant by reason of their illegal entry into the apartment house." The court overruled the objection (SF 9). Petitioner's objection to the receipt in evidence of the affidavit and warrant (SF 10-15) was likewise overruled (SF 15).

In her Motion for New Trial, petitioner made the point that she was entitled to the name of the informant [Tr. 88-90, 97] and that the evidence of marijuana was illegally obtained and therefore inadmissible [Tr. 90-93]. Like objection was made in petitioner's final Bill of Exceptions [Tr. 122-127, 161-165].

B. In the Court Below.

In addition to the Bill of Exceptions just referred to, petitioner argued her right to the name of the informant and that the evidence was illegally obtained and therefore inadmissible in her Brief to the Court (Propositions of Law Nos. 1, 5, 6 and 7).

The majority of the court below found against petitioner's arguments (Appx. A, 1, 2, 4, 5).

The dissent held contrariwise in an exhaustive opinion, during the course of which he said:

Appx. A, 6:

> "There exists in this state no statute or other authority which authorizes the issuance of a search warrant to search one's home for narcotics, or marijuana. The statute in this state which attempts to authorize the issuance of a search warrant for that

purpose is void and unenforceable, because it is in direct violation of the Constitution of this state and that of the United States."

Appx. A, 9-10:

"Sec. 16 is void, because it authorizes a search warrant to issue to search one's private residence without an oath or affirmation evidencing probable cause for the search, as required by our State and Federal Constitutions."

Appx. A, 16:

"Texas has no statute requiring that an affidavit for search warrant show probable cause.

"So then the sufficiency of the affidavit for the search warrant and the facts set forth therein upon which the search warrant was sought must be tested under the federal laws and decisions thereunder to determine what facts are necessary to be stated to show probable cause.

"The affidavit in this case did not meet the federal requirements."

Appx. A, 22-23:

"In affirming this conviction, my brethren necessarily sustain as a valid statute Sec. 16 of the Uniform Narcotic Drug Act, which authorizes a search warrant to issue upon belief, only, as against the contention that it is repugnant to the Constitution of the United States, which authorizes a search warrant to issue only upon probable cause."

In her Motion for Rehearing, petitioner again urged the same points and the error of the court in rejecting them (Motion for Rehearing, pp. 1-10; Brief in Support

of Motion for Rehearing, 2). She did likewise in her Application for Leave to File Her Second Motion for Rehearing (pp. 2-4).

Facts.

On Saturday morning, October 26, 1957 (SF48) a Dallas police officer, J. M. Souter, presented to a Justice of the Peace a partially filled-in printed form of Affidavit for Search Warrant [State's Ex. 1; SF 284]. The printed words on the affidavit stated (*ibid.*):

> "I have cause to believe and do believe that said narcotic drugs are now concealed by"

and typed in are the petitioner's name and address. After stating in print, with a space for the name, that said address is occupied, possessed, controlled and in charge of the person named, the printed form continues:

> "MY BELIEF IS BASED ON THE FOLLOWING FACTS:
>
> (A) I have been informed of the existence of the foregoing set out facts by reliable, credible and trustworthy citizen of Dallas, Dallas County, Texas.
>
> (B) and further (9)" [with a space for the insertion of the facts].

No facts were set out in the space provided.

On the basis of this affidavit, the Justice of the Peace issued the Warrant [State's Ex. 2; SF 284]. In testifying as to the basis on which the Warrant was issued, the Justice stated (SF 26) that the officer did not tell him who the reliable, credible and truthworthy citizen was and that he did not inquire of the officer (*ibid.*). He further testified (SF 27) that he received no facts from the officer as to how he came to the conclusion that the person was reliable, trustworthy and credible. The per-

functory manner in which the warrant was issued, was testified to by the judge as follows (SF 25):

> "In this search warrant, as any other search warrant, an officer of long standing if he comes to me and states to me that he believes and has reasons to believe, upon reliable information, that he needs a search warrant for certain articles, I issue it, yes sir."

The Warrant commanded the officer "to forthwith search the place above named and described" and to arrest the petitioner (SF 284). It will be remembered that this was Saturday morning, October 26 (SF 48).

Although he had sworn in the affidavit (SF 284) that he had cause to believe and did believe that narcotic drugs "are *now* concealed" (italics added) by petitioner "and unknown persons" at petitioner's address and although the warrant commanded him "to *forthwith* search the place above named and described" (italics added), the officer did not so do. Instead, at one or one-thirty on Saturday afternoon, he parked his car on the street on which petitioner's apartment was located and "placed the apartment house under surveillance" (SF 4). He stayed there until about 4:30 or 5:00 in the afternoon (*ibid.*) and returned about nine o'clock at night (*ibid.*) remaining there until about one A.M. Sunday morning (SF 5). He returned about one or one-thirty in the afternoon, the warrant still not executed (*ibid.*) and remained until about 4:30 (*ibid.*) returned about 6:30 P.M. (*ibid.*). At this time, two other officers, Revill and Frozier, were with him (SF 6).

The record does not show whether any persons entered or departed from the house prior to the time Souter left his surveillance at 4:30 P.M. on Sunday, but it does show

that at about 6 or 6:05 P.M. on Sunday night one Helen K. Smith, purportedly a friend of petitioner's (SF 176, 198) went to petitioner's house (SF 169, 198) and left at about 6:10 or 6:15 (SF 198). As noted, the officer, this time with two others, returned at about 6:30 P.M. (SF 5). At about 9 o'clock (SF 6) a Western Union delivery man came to the apartment house (SF 6), the officers got out of the car and stood inside the door at the mail boxes and when petitioner opened the door for the Western Union man, the officers entered the apartment, identified themselves, told petitioner they had a search warrant and handed it to her (SF 7).

The officers searched the apartment for about 15 to 20 minutes and found nothing unusual (SF 84). Then a person named George Owens came to the apartment (*ibid.*). Shortly thereafter a cigarette appearing to contain marijuana was found by Lt. Souter on a chair in the living room (*ibid.*).[4] Soon after this, the officers testified (SF 39, 40), petitioner told the officers that if they would let George Owens go, she would give them the rest of the marijuana, and that after George Owens left, she reached in her bosom and pulled out a bottle containing, according to the testimony, marijuana.

Aside from the questions as to whether the substance in the cigarette and bottle was, indeed, marijuana,[5] and whether marijuana can properly be denominated a narcotic drug (*cf.* 26 USC 4731(a) with 26 USC 4761), it ap-

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[4]Later the testimony of the police officers was that the cigarette was found *under* the chair (SF 99).

[5]Petitioner's counsel strenuously objected to the introduction of the substance as marijuana, on the ground of insufficient identification (SF 31, 33-37, 43, 80, 85, 88, 89). Not even the State's expert witness testified as to what tests he used to determine the nature of the substance (SF 158-160). (*Cf., Shurman v. United States*, 219 F. 2d 282, 292 (C. A. 5, 1955).)

pears clear that the substance did not belong to petitioner, that she was not the possessor thereof, but was at most, an involuntary holder. (*Cf, United States v. Landry,* 257 F. 2d 425 [C. A. 7 1958].) For the evidence is that Virginia Strom, who refused to testify on the ground of the privilege against self-incrimination (SF 165) had given a can purporting to contain marijuana to Helen K. Smith (SF 167); that Smith, being afraid to take the substance home, brought it to the home of petitioner and asked petitioner to hold it for her until she could go home, change her clothes and come back for it (SF 193); that petitioner told Smith to get rid of it (SF 195), but that she would keep it for Smith until she could get back from changing clothes (SF 196). As seen, Miss Smith did not get back and the officers stepped in.

The evidence further shows that an officer of the Dallas Police Department from early October 1957 occupied an apartment down and across the hall from petitioner under an assumed name (SF 271), that the gas [Deft. Ex. 2; SF 286] and light [Deft. Ex. 3; 287] bills were taken out at that apartment in the name of "Billy Paul," that the bills were to be sent to the address of Lt. Gannaway (*ibid.*), Capt. of Detectives in charge of the Special Service Bureau which is the division of the Dallas Police in which the officers who broke into petitioner's apartment work (SF 203), and that the police officers with the assumed name gave up the apartment about two and one-half hours after petitioner's arrest (SF 273).

Finally, a repairman for the telephone company (SF 242) while investigating a trouble call, found a jumper (wire) which cross connected the policeman's apartment with petitioner's (SF 243, 244) and by means of which the policeman could overhear the conversations on the phone in petitioner's apartment (SF 245, 246, 255).

Reasons for Granting the Writ and Argument Amplifying Same.

Preliminary Statement.

From the facts of this case it appears clear, we think, that the protection a citizen is entitled to under the right to privacy and the freedom against unreasonable searches and seizures was denied petitioner. We believe it not unfair comment to say that the inference is justified that the police officers armed themselves with a search warrant in advance—even though the affidavit said that crime was then being committed—in the hope that evidence of crime would later develop. Even further: we believe it not unfair to say, because of the strong indication of entrapment—even frame up[6]—the issuance and execution of the warrant without basis of fact and the denial to petitioner of the right to ascertain the basis for the affidavit, deprived her of essential rights which denied to her a fair trial. It is for this reason that this is not an ordinary case of a State prosecution involving the admissibility of illegally obtained evidence or the denial to a defendant of the name of an informant.

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[6]For example:

(1) The surveillance by taking an adjacent apartment.

(2) The wire tapping.

(3) The involvement of so many high-ranking police officers—a captain, two lieutenants and a sergeant—in what would appear to be a petty raid in a petty matter.

(4) The fact of the search of the apartment upon the initial raid without finding any contraband.

(5) The "discovery" of a cigarette butt after a man, Owens, a friend of Phillips entered the apartment.

(6) The testimony by one officer that he found the cigarette on a chair contradicted by the other officer in the raid who said he observed the cigarette under the chair.

I.

Hearing Should Be Granted to Determine Whether the Wolf v. Colorado, 338 U. S. 25, Doctrine Applies to a State Which Has a Statute Rendering Inadmissible Evidence Obtained "in Violation of Any Provision" of the Constitution of the United States.[7]

This question has never been determined by the Court.[8]

In *Schwartz v. Texas*, 344 U. S. 199, the court had before it the question as to whether Article 727a of the Texas Code of Criminal Procedure rendered inadmissible evidence obtained in violation of the *laws* of the United States. The Court found that the statute carefully made evidence admissible even though obtained in violation of

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[7]This is not to say that petitioner considers the *Wolf v. Colorado* doctrine correct. Indeed, the contrary is the case and petitioner suggests that this might be an appropriate case and time to reconsider that doctrine. *Cf.*, since *Wolf v. Colorado:*

(1) the granting of certiorari by this Court, and the decision, in *Frank v. Maryland*, ... U. S. ....., 27 L. W. 4304;

(2) the noting of probable jurisdiction in *Eaton v. Price*, No. 609, this term, 27 L. W. 3348;

(3) Mr. Justice Clark concurring in *Irvine v. California*, 347 U. S. 128, 138: "Had I been here in 1949 when Wolf was decided, I would have applied the doctrine of *Weeks v. United States*, 232 U. S. 383, to the states";

(4) Mr. Justices Frankfurter and Burton, dissenting, in *Irvine v. California*, 347 U. S. at 142: "The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial government";

(5) Mr. Justice Whittaker, concurring, in *Frank v. Maryland*, ... U. S. ....., 27 L. W. 4304, 4311: "The core of the Fourth Amendment prohibiting unreasonable searches applies to the states through the Due Process clause of the Fourteenth Amendment."

[8]A similar, though not identical, question is involved in *McIntyre v. Illinois*, No. 905, Oct. Term 1958, now pending before this Court on petition for writ of certiorari.

federal law[9] and that 47 USC 605 would not be construed, absent clear manifestation of Congressional intent, to cover state court proceedings. Left undecided in that case was the question as to whether, if the State statute did provide for the inadmissibility of evidence obtained in violation of the laws or Constitution of the United States, this Court would permit a conviction to stand where such evidence was admitted. This, we contend, is the question here. Compare the concurring opinion of Mr. Justice Frankfurter in the *Schwartz* case where he said (344 U. S. at 204):

> ". . . (I)f the Texas legislation means that the Texas courts are bound by what this Court deems a violation of the United States Constitution, the problem (as to whether a federal question is raised) is, or might be, different."

And he felt that the statute did mean just that and that the Texas court had correctly followed this Court's decisions.

Review is appropriate here, therefore, because squarely presented (see the excerpts from the dissenting opinion in the court below, supra, pp. 7-8) is the federal question as to whether the United States Constitution was violated.

There are additional considerations as to why certiorari should be granted.

This Court, and all the justices thereof who have passed upon the question, whether with the majority or with the dissent, has made clear the view that the guarantee against

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[9]Subsequent to the *Schwartz* decision the statute was again amended by the Texas legislature so as to render inadmissible evidence obtained in violation of the laws of the United States. (Acts 1953, 53rd Leg., p. 669, ch. 253, Sec. 1).

unreasonable searches and seizures, embodied in the Fourth Amendment, is a part of the Due Process Clause of the Fourteenth Amendment, whether stated in terms of being "implicit in 'the concept of ordered liberty'" (*Wolf v. Colorado*, 338 U. S. 25, 27; *Stefanelli v. Minard*, 342 U. S. 117, 119; *Irvine v. California*, 347 U. S. 128, 132), or in terms of "'(t)he security of one's privacy against arbitrary intrusion by the police' (being) fundamental to a free society and as such protected by the Fourteenth Amendment" (*Frank v. Maryland*, ... U. S. ....., 27 Law Week 4304), or in terms of the Fourth Amendment being applicable to the states (dissenting opinions in *Wolf v. Colorado*, 338 U. S. 25, 40, 41, 47; dissenting opinion in *Stefanelli v. Minard*, 342 U. S. 117, 125; concurring and dissenting opinions in *Irvine v. California*, 347 U. S. 128, 138, 151, 152).

Frank v. Maryland case, *supra*, rather than suggesting that unreasonable searches and seizure questions in State cases (aside from "shocking conscience" cases like *Rochin v. California*, 342 U. S. 165) are foreclosed from consideration by this Court, demonstrates that this Court will be ever alert to examine the questions when presented in an appropriate case. For, as the Court said in *Wolf v. Colorado*, 338 U. S. at 27:

> ". . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

The noting of probable jurisdiction in *Eaton v. Price*, #699, this term, illustrates the "close and perceptive in-

quiry". (*Bartkus v. Illinois*, ... U. S. ....., 3 L. Ed. 2d 684, 689) this Court will make when due process-unreasonable search and seizure questions are presented to it. The reasons which impelled the Court to note probable jurisdiction in the *Eaton v. Price* case are more compelling here.

In *Frank v. Maryland*, the Court paid great deference to a long standing practice. But it did so because of "the carefully circumscribed demand" (27 L.W. at 4307) the State made upon the citizen's privacy. No such careful circumscription is present here. From the perfunctory manner in which the warrant was issued, based upon no facts, petitioner was indeed treated to "(t)he knock on the door, . . . as a prelude to a search, without authority of law but solely on the authority of the police." (*Wolf v. Colorado*, 338 U. S. at 27.) As such, it is "to be condemned as inconsistent with the conception of human right" (*ibid.*, at 28). The interposition of the independent judgment of the magistrate was simply non-existent.[10] The search here was the same, in effect, as those carried out under the general warrants condemned in *Entick v. Carrington*, 19 Howell's State Trials, col. 1029, and under the Writs of Assistance against which James Otis inveighed. For here, indeed, petitioner's liberty was at "the hands of (the) petty officer." (From the quote of James Otis' speech in *Frank v. Maryland*, 27 L. W. 4304, 4305.) Where a procedure is a "mask," this Court will move to protect a petitioner's constitutional rights (*Moore v. Dempsey*, 261 U. S. 86, 91).

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[10] *Cf.* the testimony of the magistrate (SF 25):

> "In this search warrant, as any other search warrant, an officer of long standing if he comes to me and states to me that he believes and has reasons to believe, upon reliable information, that he needs a search warrant for certain articles, I issue it, yes sir."

Moreover, we believe the distinction made in *Frank v. Maryland*, between a search for health and a search for evidence of criminal action, calls for a hearing here, for it is the latter that is present in the case at bar, not the former.

In *Wolf and Irvine*,[11] the majority of this Court refused to upset, as violative of the Due Process Clause of the Fourteenth Amendment, convictions in which illegally obtained evidence had been admitted. The rationale of these decisions was that the exclusionary rule is not a constitutional command, but is a rule of evidence and that so long as the state provided (by criminal proceedings or suits in trespass for damages) methods of vindication of the right against arbitrary police intrusion of privacy, state convictions so obtained would not be set aside under the Fourteenth Amendment.

However, in the *Wolf* case, this Court said (338 U. S. 25, 28):

> ". . . (W)ere a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

In *Stefanelli*, this doctrine was adhered to (342 U. S. 117, 119).

The case at bar comes to this Court within this rationale of the *Wolf* case. For, by its adoption of the exclusionary rule, but nevertheless holding the admitted evidence not to have been obtained in violation of the constitutional

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[11] *Stefanelli* went off on the theory of the restraint to be exercised by the Federal Courts in interfering with the administration of the state criminal prosecutions.

right against arbitrary incursion into privacy,[12] Texas has affirmatively sanctioned a violation of the Fourteenth Amendment.[13]

In *Irvine* this Court said (347 U. S. 128, 134) that with the *Wolf* doctrine being known, the "state courts may wish further to reconsider their evidentiary rules. But to upset state convictions before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power." As seen, Texas does have the exclusionary rule (Art. 727a, Vernon's Code Civ. Proc.).

Accordingly, the case comes to this Court ripe for consideration as to whether there has been an unconstitutional application of the search and seizure guarantee in the same manner as if any other constitutional guarantee were involved.[14]

As we read the last quoted statement from the *Irvine* case, we believe this Court was saying that if, after *Wolf*, a case came to this Court from a state which did have the exclusionary rule, the question as to whether the Fourteenth Amendment protected a defendant convicted by evi-

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[12]The question as to whether the evidence was illegally obtained will be discussed below.

[13]As suggested in the petition in *McIntyre v. Illinois*, No. 905, this term, page 11, the case comes to this court essentially in the same posture as the instance not passed upon by the Court in *Wolf v. Colorado*, 338 U. S. 25, 33, namely, where Congress, pursuant to Section 5 of the 14th Amendment, had passed legislation applying the exclusionary rule to the states.

[14]*E.g.*, freedom of press (*Near v. Minnesota*, 283 U. S. 697); right to counsel in criminal cases (*Powell v. Alabama*, 287 U. S. 45); freedom of speech (*DeJonge v. Oregon*, 299 U. S. 353); freedom of religion (*West Virginia Board of Education v. Barnette*, 319 U. S. 624); coerced confessions (*Brown v. Mississippi*, 297 U. S. 278).

dence illegally obtained would be reviewed by the Court. Even prior to that, in the *Schwartz v. Texas* case, the Court granted review but, as seen, found that the exclusionary rule did not apply. This is such a case, however. The proposition involved is an important one and has not been considered by the Court. Certiorari should be granted to pass upon and establish the principle.

That this was the view of the dissenting judge below is clear from his opinion. Thus he said, after quoting Article 727a (Appx. A, 16):

> "Under that statute, evidence obtained as a result of a search of one's private residence must have been obtained, in order to be admissible, not only in accordance with the Constitution and laws of this state.
>
> "That statute makes applicable the Federal Constitution and laws of the United States in this case."

And again (Appx. A, 22-23):

> "In affirming this conviction, my brethren necessarily sustain as a valid statute Sec. 16 of the Uniform Narcotic Drug Act, which authorizes a search warrant to issue upon belief, only, as against the contention that it is repugnant to the Constitution of the United States, which authorizes a search warrant to issue only upon probable cause.
>
> "Such holding brings this case within the appellate jurisdiction of the Supreme Court of the United States.
>
> "If Sec. 16 is a valid statute and not repugnant to the Constitution of the United States, the Supreme Court of the United States should so hold; if Sec. 16 is repugnant to the Fourth Amendment to the Constitution of the United States, as I contend, that court ought to so hold."

A.

The Evidence Was Illegally Obtained Because the Search Warrant Was Issued Without Probable Cause.

We do not think the point need be labored. It is clear that the warrant was issued merely on the police officer's allegation that he had reason to believe and did believe that a crime was being committed [State's Ex. E; SF 284]. The only basis for this belief was that a reliable, credible and trustworthy citizen of Dallas had informed him of these "facts." Of this type of affidavit, the dissent below said (Appx. A, 10):

> ". . . By no stretch of the imagination can it be said that 'information and belief' or 'reason to believe' constitute 'probable cause,' for no facts or circumstances are stated which evidence 'probable cause.'"

The dissenting judge relied upon this Court's decisions in *Byars v. United States*, 273 U. S. 28, and *Nathanson v. United States*, 290 U. S. 41. His reliance thereon is well founded. In the *Byars* case the Court held as "clearly bad" under the Fourth Amendment a warrant issued upon an affidavit in the same words as those at bar: "that affiant 'has good reason to believe and does believe the defendant has in his possession' " intoxicating liquors (273 U. S. at 29). In the *Nathanson* case, the warrant was issued pursuant to the sworn affidavit of the customs officer "that he has cause to suspect and does believe that liquor . . . has . . . been brought into the United States contrary to law, and . . . is now deposited and contained within the premises of J. J. Nathanson . . . at 117 No. Bastrom Ave. . . ." (290 U. S. at 44).

The statement in the affidavit at bar that the information was given by a reliable informant adds nothing, for, as this Court said in the *Nathanson* case (290 U. S. at 47):

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."[15]

Accordingly, the illegality of the search cannot be gainsaid. The important question is whether this Court will review a case where the State court sanctions the illegality in the face of the exclusionary statute. With the dissent below, we urge a hearing by this Court.

II.

This Court Should Grant Certiorari to Determine the Question as to Whether the Doctrine of Roviaro v. United States, 353 U. S. 53 Applies to a State Conviction.

This question has never been decided by the Court; it should be.

It is manifest that under the suspicious circumstances surrounding the execution of the warrant, regardless of what may be thought of the proposition in the abstract, petitioner was entitled to know the name of the reliable,

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[15]Not present in the case at bar is a situation such as was before this Court in *Draper v. United States*, ... U. S. ....., 27 L. W. 4085, No. 136, this term, where the information that was given to the officer to justify his arrest without a warrant was before the court in detail. Had the Texas courts allowed exploration as to what facts the police officer had, a different case might be presented.

credible and trustworthy citizen of Dallas in order to be able to present her defense of entrapment.[16] This is not merely a matter of procedure which can be brushed aside under the guise of State practice. The right of a defendant to relevant evidence goes to the heart of a fair trial (*cf. Jencks v. United States*, 353 U. S. 657, 669).

Twice prior to trial [Tr. 13-16; 17-24], by sworn affidavit (SF 16, 24), petitioner sought the name of the informant. Her motions were overruled [Tr. 16, 24]. During the trial, on cross-examination, after the prosecution, by its own witness, had brought out that entry into petitioner's apartment was by means of a search warrant (SF 8) and it and the affidavit were admitted, over objection (SF 20), into evidence (SF 15), petitioner again sought the name of the informant (SF 49). The court sustained the objection (*ibid*). In her pre-trial motions [Tr. 13-24] petitioner set out the facts under which she claimed the right to and the need of the informant's name. They may be briefly summarized as:

1. The informant was a material witness for the petitioner;

2. The informant was a moving party to the commission of the offense;

3. The informant was working in conjunction with agents of the State of Texas, to wit, the Dallas Police Department;

4. The informant was the only person who could testify in behalf of petitioner with reference to the contraband's being at the place at the time it was illegally

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[16]The trial court refused an instruction *re* entrapment [Tr. 69, 70], but this only compounds the denial to petitioner of a fair trial. Entrapment is a legal defense in Texas (*Cooper v. State*, 288 S. W. 2d 762).

seized by the police officers under the invalid search warrant;

5. The informant could be necessary in the trial of the cause to aid petitioner in proving her defense of entrapment;

6. The informant was a moving link in bringing about the commission of the offense; and

7. The State should make disclosure of the name of the informant before the trial in order that her attorneys could interrogate the informant for the preparation of her defense and to determine whether or not she would desire to use said informant in the defense of her cause.

Under these circumstances it is manifest that. had this been a federal court proceeding, withholding from defendant the name of the informant would have been a clear denial of the right to a fair trial.

In *Scher v. United States,* 305 U. S. 251, the Court, in upholding the denial of the identity of the informer under the circumstances of that case, distinguished the type of case at bar. Thus, it said (305 U. S. at 254):

> "Justification is not sought because of honest belief based on credible information as in United States v. Blick (D. C.) 45 F. 2d 627."

But that is precisely what was sought in the case at bar.

In the *Blick* case, which was approved by this Court in *Scher,* the Court said (45 F. 2d at 629):

> ". . . The only question here is as to whether or not, when the matter is presented to a court for the purpose of seeking a determination of whether, under all the circumstances, there was probable cause, this element of those circumstances may remain un-

disclosed. It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief. A belief must or should rest upon a substantial basis. . . ."

Again in *Scher,* this Court pointed out (and the language was approved in *Roviaro* [353 U. S. at 61, f.n. 9]):

". . . public policy forbids disclosure of an informer's identity *unless essential to the defense, as,* for example, *where this turns upon an officer's good faith.*" (Italics added.)

This is percisely the case at bar.

This being a State case, the question arises, of course, as to whether the denial to petitioner under the circumstances herein amounted to the denial of a fair trial and hence a denial of due process under the Fourteenth Amendment.

The fact that the precise question at bar—whether the denial to defendant in a state prosecution, under circumstances such as in this case, of the name of the informant on the basis of which a search warrant was issued, is a denial of due process—has never been decided by this Court, is a sufficient ground for hearing. But the principles that control are not unfamiliar. It is not new doctrine that if a State court denies a defendant a fair trial, or a fair proceeding, this is a denial of due process and this Court will not only hear such a case but will not permit such a conviction to stand. (*E.g. Griffin v. Illinois,* 351 U. S. 12; *Chessman v. Teets;* 350 U. S. 3; *Molinski*

v. New York, 324 U. S. 401; *Powell v. Alabama*, 287 U. S. 45; *In re Oliver*, 333 U. S. 257; *Haley v. Ohio*, 332 U. S. 596; *Hawk v. Olson*, 326 U. S. 271.)[17]

Accordingly, the question here is whether the denial to petitioner, under the circumstances of this case, of the name of the informant rises to the dignity of a denial of due process. We believe that it does. At the least, the question is of such importance and arises so often that this Court should hear the matter.

In *Roviaro*, this Court said (353 U. S. at 60-61):

> ". . . Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. . . ."

To us, the words "fair determination of the cause" are words of due process.

Again, in *Roviaro*, the Court said (353 U. S. at 63):

> ". . . The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise, the burden of going forward might become unduly heavy."

These words describe exactly the situation at bar. Compare *Speiser v. Randall*, 357 U. S. 513, where this Court held as violative of the due process clause of the Fourteenth Amendment, in an oath for tax exemption case, a requirement putting the burden of proof on the taxpayer. Similarly here, by denying to petitioner the name

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[17] This list is not, of course, nor is it intended to be, either exhaustive or necessarily representative. It just illustrates the point.

of the informant, the State put too heavy a burden on her to go forward and therefore violated due process.

We do not believe the Court was writing any narrow opinion in *Roviaro*. Thus, for example, the Court said (353 U. S. at 63 and 64):

> "The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might have been helpful to the defense. . . . His testimony might have disclosed an entrapment. . . . The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide."

So here.

Accordingly, we urge, the question is of sufficient importance to warrant consideration by this Court.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
JOE TONAHILL,
MELVIN BELLI,
JULIUS LUCIUS ECHELES,
Attorneys for Petitioner.

APPENDIX A.

Juanita Dale Phillips, Appellant, The State of Texas, Appellee.

Appeal from Dallas County. No. 30,043.

Opinion.

The offense is possession of marijuana, a narcotic drug; the punishment, fifteen years.

On the morning of October 26, 1957, J. M. Souter, Lieutenant of Detectives assigned to the Special Services Bureau of the Dallas Police Department, secured the issuance of a search warrant authorizing the search of appellant's apartment.

In the affidavit made by Lt. Souter he swore that appellant and unknown persons unlawfully possessed marijuana and that he had cause to believe and did believe that said narcotic drugs were then concealed by appellant and unknown persons in said apartment (described therein) which appellant and unknown persons occupied, possessed, controlled and had charge of.

The affidavit also contained the following: "My belief as aforesaid is based on the following facts: (A) I have been informed of the existence of the foregoing set out facts by reliable, credible and trustworthy citizen of Dallas, Dallas County, Texas, (B) and further (9)"

Appellant's counsel diligently sought to require that Lt. Souter disclose the name of his informer, but Souter declined to name him and the court refused to require him to do so.

The ruling of the trial court finds support in the holdings of this Court. Hudson v. State, 156 Tex. Cr. R. 612, 243 S. W. 2d 841, and cases there cited; Shafer v.

State, 151 Tex. Cr. R. 558, 209 S. W. 2d 599. See also People v. Gonzales, (Cal.) 297 Pac. 2d 50.

Appellant insists that the affidavit shows no probable cause, in the absence of which the search thereunder was void. Judge Richburg, the magistrate who issued the warrant, was called by appellant in his effort to show that the search warrant was invalid. He testified before the court in the jury's absence that Lt. Souter made the affidavit before him and that he was satisfied and decided that there was probable cause.

The search warrant appears to be valid. Davis v. State, Tex. Cr. App., 302 S. W. 2d 419; Chapin v. State, 107 Tex. Cr. R. 477, 296 S. W. 1095.

After keeping the apartment under surveillance for some hours, Lt. Souter went to appellant's apartment after 9 P.M. on October 27, 1957, where he found appellant and served the warrant. He was accompanied by Dallas Police Officers Frazier and Revill of the Narcotics Squad.

Shortly after the officers arrived, one George Owens came to the apartment. Lt. Souter then found a marijuana cigarette in the apartment.

Appellant then told the officers "that if we would let George Owens go she would give us the rest of the marijuana she had."

George Owens was permitted to leave, and thereupon appellant produced from her bosom a glass bottle containing marijuana. No authorities are cited in support of the contention that the officers' promise made this statement inadmissible, and we know of none. The statement was *res gestae* and was admissible. Sparks v. State, 161 Tex. Cr. R. 100, 275 S. W. 2d 494; Smith v. State,

157 Tex. Cr. R. 637, 253 S. W. 2d 665; Glaze v. State, Tex. Cr. App., 310 S. W. 2d 88.

The State offered this proof through the witness Lt. Souter and the marijuana cigarette and the bottle and contents were offered as Exhibits, marked and admitted without any objection being made at that time based upon the claim that such evidence was unlawfully obtained. Under the following cases, any objection as to the results and fruits of the search were waived. Killingsworth v. State, Tex. Cr. App., 306 S. W. 2d 715; Wyatt v. State, 162 Tex. Cr. R. 134, 282 S. W. 2d 392; and Outley v. State, 162 Tex. Cr. R. 314, 284 S. W. 2d 356. See also Gonzales v. State, No. 30,106, this day decided.

The State offered further proof as to the substance in the cigarette and the contents of the bottle being marijuana, and corroborating Lt. Souter's version of appellant's possession thereof.

Appellant sought through cross-examination of the State's witnesses and her own witnesses to establish that her telephone had been tapped and that the information which was used to secure the search warrant was illegally obtained in that manner, but the State's witnesses denied tapping or intercepting any telephone conversation.

The cautious trial judge submitted to the jury appellant's theory of the law regarding wire tapping and illegal interception of any conversation conveyed by telephone, and instructed the jury to disregard any evidence admitted before them which they believed or had reasonable doubt was obtained in violation of said law "by obtaining information that led directly or indirectly to the discovery of any of the evidence which the State introduced in this case."

Evidence was introduced by appellant to the effect that the marijuana which appellant produced from her bosom and delivered to the officers belonged to Helen K. Smith, it having been given to her by Virginia Strom and left with appellant shortly before the officers arrived.

Appellant did not testify. Virginia Strom was called by appellant, claimed her privilege against self-incrimination and did not testify. Helen K. Smith testified that appellant agreed to her leaving the marijuana with her at her apartment after she told the appellant it was marijuana. Thus appellant's witness placed her in possession of marijuana, rendering harmless any error in the admission of testimony of the State as to her possession of that marijuana. Schaefer v. State, 121 Tex. Cr. R. 220, 53 S. W. 2d 302; Haykel v. State, 158 Tex. Cr. R. 359, 255 S. W. 2d 1014.

We confess our inability to find any defensive issue in this testimony. Ownership may have been in the witness Smith, but possession was in appellant. If appellant has any ground of complaint in this regard, it must be that the punishment assessed by the jury suggests that they did not accept it as a mitigating circumstance.

Motion for change of venue was filed and was controverted, and after three witnesses had been examined the trial court announced that he would take the motion under advisement. After nineteen veniremen had been examined and none disqualified, the motion was overruled and appellant excepted.

The *voir dire* examination of the veniremen is not before us and there is nothing to show that any objectionable juror served or that appellant exhausted her challenges.

No error is shown in the court's overruling the motion for change of venue. See Tyler v. State, 163 Tex. Cr. R. 441, 293 S. W. 2d 775; McCarley v. State, 161 Tex. Cr. R. 263, 276 S. W. 2d 300; Kizzee v. State, Tex. Cr. App., 312 S. W. 2d 661, and cases cited; Plater v. State, No. 29,756 (not yet reported).

Appellant complains that her motion for new trial based upon the receipt of evidence by the jury after retirement should have been granted.

The evidence heard upon said motion and allegations at most raised an issue of fact which the trial court was warranted in determining contrary to appellant's contention, and no abuse of discretion is shown.

We have examined the other propositions upon which reversal is sought and find no error which would warrant reversal.

The judgment is affirmed.

Woodley, *Judge*.

(Delivered January 14, 1959)

Juanita Dale Phillips, Appellant vs. The State of Texas, Appellee.

Appeal from Dallas County. No. 30,043.

Dissenting Opinion.

If the Constitution of this state and that of the United States, which guarantee that one's home is secure against an unreasonable and unlawful search and seizure, are in force and effect and are to be enforced and followed and obeyed by the courts, this conviction can not and ought not be permitted to stand, for it was obtained in violation of those constitutional guarantees.

If the statute law of this state which says that no evidence obtained in violation of any provision of the Constitution and laws of the United States and of this state shall be admitted in evidence against the accused in the trial of a criminal case is in full force and effect in this state and which should be followed and obeyed by the courts, this conviction can not and ought not to be permitted to stand. That statute was violated in securing this conviction. Art. 727a, Vernon's C.C.P.

This conviction rests upon evidence obtained as a result of the search of appellant's home by peace officers acting under the authority of a search warrant.

There exists in this state no statute or other authority which authorizes the issuance of a search warrant to search one's home for narcotics, or marijuana. The statute in this state which attempts to authorize the issuance of a search warrant for that purpose is void and unenforceable, because it is in direct violation of the Constitution of this state and that of the United States.

I will endeavor to demonstrate the correctness of the foregoing statements:

Art. 1, Sec. 9, of the Constitution of this state says:

"The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

The Fourth Amendment to the Constitution of the United States reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These are not a mere mass of words or meaningless platitudes. They are solemn declarations of the people of this state and nation by which each citizen and all citizens of this state and nation are protected against unlawful arrests and seraches and the use of governmental force to search their homes without their consent.

A reasonable search within the meaning of those constitutional provisions is one that is lawful and made in accordance with law. All others, then, are unlawful and are barred by the Constitutions.

Early in the history of this state, the legislature enacted Title 6 of our original code of criminal procedure, setting forth therein the procedure to be followed in securing and issuing search warrants. The legislature was there providing the procedure whereby it might be deter-

mined when a search of one's home was reasonable and therefore lawful and not inhibited or condemned by the Constitutions.

Search warrants were there authorized to be issued to search for stolen property or property illegally acquired, for implements kept for use in forging and counterfeiting, and for arms or munitions kept or prepared for the purpose of insurrection or riot. Art. 305, C.C.P.

In none of the statutes comprising Title 6 does one find the words "probable cause." The legislature made no effort to define what was meant by those words, as used in the Constitutions. There was no provision made in those statutes to require that an affidavit evidencing probable cause be filed as a condition precedent to the issuance of a search warrant. The meaning of "probable cause" was left to the courts.

The courts were not long in defining that term, as used in the Constitutions.

When the Supreme Court of this state had appellate jurisdiction in criminal cases, that court defined "probable cause," in Landa v. Obert, 45 Tex. 539, as:

"A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

That definition has stood unchanged and unchallenged throughout the years and appears to be the definition accepted by all jurisdictions.

It was not until 1937 that the legislature of this state legislated upon the subject of the issuance of search warrants to search for narcotics. This the legislature attempted to do by the enactment of Sec. 16 of the

Uniform Narcotic Drug Act, appearing as Art. 725b, Vernon's P. C.[1]

Sec. 16 thereof furnishes the basis as well as the procedure for the issuance of a search warrant to search one's home for marijuana.

It is by reason of Sec. 16 that the warrant to search this appellant's home was issued. If that statute is void it furnishes no basis for the issuance of a search warrant, and any warrant to search which is issued thereunder is void.

Sec. 16 is void, because it authorizes a search warrant to issue to search one's private residence without

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[1]"Sec. 16. (Search Warrants—Issuance) Whenever any officers or employee of the Department of Public Safety or any peace officer who has authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magistrate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative thereto, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act. Upon the execution of such search warrant the officer executing the same shall make due return thereof to the Court issuing the same, together with a sworn inventory of all narcotic drugs taken thereunder. The Court shall thereupon issue process against the person owning or controlling the narcotic drugs and upon return thereof it shall proceed to determine whether or not the same are held or possessed in violation of the provisions of this Act, and make up a finding to the effect that the drugs are so illegally held or possessed, a judgment shall be entered against the owner or person found in the possession of the same for the costs of the proceedings and provide for the disposition of the property forfeited, as provided by the terms hereof. In no event shall the narcotic drugs seized by any authorized person under authority of a search warrant or without authority of a search warrant be taken from the custody of any officer or other person authorized to seize same, by writ of replevin or other process, but the same shall be held by the officer to await the final judgment in such criminal proceedings as may be had thereon."

an oath or affirmation evidencing probable cause for the search, as required by our State and Federal Constitutions.

Under that section all that is necessary for the issuance of a search warrant to search one's home for narcotics is for some peace officer to file or cause to be filed with some magistrate his "sworn complaint" that he has "reason to believe" that some person has in his possession narcotic drugs in violation of law. Upon the filing of such complaint the magistrate issues the search warrant under the applicable procedure set out in Title 6 of the Code of Criminal Procedure.

To make doubly sure that a search warrant could issue upon an affidavit of an officer only that he has "reason to believe," the legislature made it clear that the provisions of Sec. 16 were to apply over any provision of Title 6, C.C.P., to the contrary.

By no stretch of the imagination can it be said that "information and belief" or "reason to believe" constitute "probable cause," for no facts or circumstances are stated which evidence "probable cause."

In Chapin v. State, 107 Tex. Cr. R. 477, 296 S. W. 1095, this court held that "reason to believe" and "do believe" did not constitute probable cause.

In that case, an affidavit for search warrant upon information and belief was held illegal. That holding in the Chapin case has never been changed by this court but has been repeatedly followed heretofore. It is the law of this state today.

Under the Constitution of this state it is clear that a warrant to search one's home can be issued only upon affidavit which evidences probable cause for the search and that it can not issue upon an affidavit of "information and belief." See also: Pate v. State, 129 Tex. Cr. R.

45, 83 S. W. 2d 984, and Trimmer v. State, 135 Tex. Cr. R. 372, 120 S. W. 2d 265.

The federal decisions under the Constitution and laws of the United States are to the same effect. I need only to call attention to the case of Byars v. U. S., 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520, by the Supreme Court of the United States, to justify that statement. There, it was held that a search warrant issued upon an affidavit of information and belief was bad, under the Fourth Amendment to the Federal Constitution and the laws of the United States. See, also, the case of Nathanson v. U. S., 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159, by the Supreme Court of the United States, which holds that a search warrant issued upon an affidavit of suspicion and belief, without any statement of the facts or circumstances by which the issuing officer can find probable cause therefor, violates the Constitution and laws of the United States.

It is apparent that this court and the Supreme Court of the United States are in complete accord with the legal conclusion that a search warrant to search one's private residence can not issue upon an affidavit of mere opinion or belief. It may issue only upon an affidavit evidencing probable cause for the search.

In addition to the Fourth Amendment to the Federal Constitution and the federal decisions, including the decisions of the Supreme Court of the United States, we have a federal statute which says that a search warrant under federal law can be issued only upon probable cause and that affidavits or depositions must set forth the facts tending to establish the grounds of the application or the probable cause for believing they exist. Sec. (c), Rule 41, Title 18, U.S.C.A.

So is it demonstrated that within the meaning of the Constitution of Texas and that of the United States a warrant to search a private residence can not issue upon an affidavit based solely upon information or belief—notwithstanding all of which, the legislature of this state said, in the enactment of Sec. 16, to the exact contrary: i.e., that a search warrant may issue upon the affidavit of a peace officer that he has "reason to believe," with no requirement whatsoever of a showing of "probable cause."

If Sec. 16 is valid, then Art. 1, Sec. 9, of the Constitution no longer exists. If Art. 1, Sec. 9, is a part of our Constitution, then Sec. 16 is void. The Constitution and Sec. 16 can not both be valid.

What does the Constitution of this state say about such act of the legislature? Here is what Art. 1, Sec. 29, of our Bill of Rights says:

"To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, *and all laws contrary thereto*, or to the following provisions, shall be void." (Emphasis supplied.)

As was said in Faulk v. Buena Vista Park Burial Ass'n., 152 S. W. 2d 891, that section is so plain that construction thereof is unnecessary.

Art. 1, Sec. 9, of the Bill of Rights says that a search warrant to search a private residence can issue only upon probable cause. By the enactment of Sec. 16, the legislature said to the exact contrary—that is, that a search warrant to search a private residence may issue upon information and belief. Art. 1, Sec. 29, of the Bill of Rights says that such an enactment by the legislature is void because it is in contravention of the Constitution.

To my mind, it is inconceivable how Sec. 16 may be judicially declared to be a valid statute and a search warrant issued in accordance with the provisions of Sec. 16 declared valid. Yet that is what my brethren hold when they affirm this conviction.

The legislature can no more disobey and violate the Constitution than can any private citizen of this state. The legislature was powerless to say that a warrant to search one's private residence may issue upon an affidavit of a peace officer, upon his belief, without probable cause.

The search warrant used in this case as authority to search appellant's residence, being based upon a void statute, was itself void.

For reasons other than that it was issued upon a void statute, the search warrant in this case was void:

What did the affiant swear in the affidavit? He swore, positively and without equivocation, that on the 26th day of October, 1957, in Dallas County, Texas, the appellant "Juanita Dale Phillips and unknown persons did then and there unlawfully possess a narcotic drug, to-wit: marijuana."

If the affiant knew, as he swore, he did, that appellant unlawfully possessed marijuana, it occurs to me that he should have arrested her because he knew she was committing a felony either in his presence or within his knowledge. The affiant appears not to have done that, but, instead, sought to secure a search warrant to search the home of Juanita Dale Phillips.

Note is also taken of the fact that the affiant did not say in the affidavit that he knew *where* appellant kept or *how* she possessed the marijuana which he says she unlawfully possessed.

Following the above quoted portion thereof, the affidavit states:

"And I have cause to believe and do believe that said narcotic drugs are now concealed by Juanita Dale Phillips and unknown persons in an apartment, #24A, situated in Dallas County, Texas, at 4328 McKinney Avenue, City of Dallas, Dallas County Texas, which said Juanita Dale Phillips and unknown persons occupies, possesses, controls and *has* charge of."

It will be noted that the affiant did not say that he knew the narcotics were in the apartment or that appellant possessed the narcotics in the apartment. What the affiant there said was that he believed the appellant and unknown persons were concealing the narcotics in the apartment occupied, possessed, and controlled by her and unknown persons.

The "belief" there expressed was authorized by Sec. 16.

The affiant then proceeded to give in the affidavit the basis for his belief, as follows:

"My belief as aforesaid, is based upon the following facts: I have been informed of the existence of the foregoing facts set out by reliable, credible, and trustworthy citizens of Dallas, Dallas County, Texas."

No facts were stated or had been theretofore stated. All that had been said by the affiant was that he had "cause to believe" and did "believe" that the narcotics were concealed in the apartment.

By no hypothesis of reasoning can it be said that any facts were stated in the affidavit which would warrant a cautious man in the belief that narcotics were concealed in the apartment. There was, then, no probable cause stated

in the affidavit for the search warrant. To the contrary, it was based entirely upon belief.

The affiant asked that a warrant be forthwith issued to search appellant's home for and to seize the narcotic drugs. Upon that affidavit the justice of the peace issued the search warrant commanding the sheriff or any other peace officer of Dallas County to search appellant's home for narcotics. The warrant was issued upon the following finding and conclusion of the justice of the peace:

". . . Complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of the warrant."

Such finding is not supported by the affidavit, because no facts were stated there by which probable cause was evidenced. The finding of the justice of the peace of the existence of probable cause is not warranted or authorized by the affidavit. The right to issue the warrant rested alone upon the matters stated in the affidavit. Extrinsic evidence can not be received to aid an affidavit. Moreover, when the justice of the peace issued the warrant upon a finding of probable cause, he went further and issued the warrant for a reason not authorized by Sec. 16.

There were no facts stated in the affidavit by which the justice of the peace, in the exercise of his discretion, could find that probable cause existed for the issuance of the search warrant. The warrant so issued was invalid.

Ordinarily—and especially under federal procedure in the federal courts—evidence obtained as a result of an invalid search warrant, being in violation of the Constitution, is not admissible.

Texas was not content to let the inadmissibility of such evidence rest alone upon the Constitution; it has a

special statute upon the subject. I refer to Art. 727a, Vernon's C.C.P., which reads as follows:

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

Under that statute, evidence obtained as a result of a search of one's private residence must have been obtained, in order to be admissible, not only in accordance with the Constitution and laws of this state but also in accordance with the Constitution and laws of the United States.

That statute makes applicable the Federal Constitution and laws of the United States in this case.

The reason heretofore pointed out as showing the affidavit for the search warrant in this case did not meet the requirements of the Constitution and the laws of this state are also applicable to and show that the affidavit for the search warrant did not meet the requirements of the federal laws wherein probable cause is made necessary to the issuance of a search warrant.

Texas has no statute requiring that an affidavit for search warrant show probable cause.

So then the sufficiency of the affidavit for the search warrant and the facts set forth therein upon which the search warrant was sought must be tested under the federal laws and decisions thereunder to determine what facts are necessary to be stated to show probable cause.

The affidavit in this case did not meet the federal requirements.

There is a further reason why the search warrant used in this case is invalid:

The affidavit for the search warrant was made by one person for the search of a private residence.

An affidavit for a search warrant to search a private residence must be made by *two* credible persons.

Title 6, C.C.P., relating to search warrants, authorizes the issuance thereof upon the affidavit of one affiant; it does not specify that more than one affiant is required.

When the legislature came on to implement state-wide prohibition under the so-called Dean Law, provision was made by Art. 691, P. C., for the issuance of search warrants to search for contraband liquors. It was specified therein that the search warrant so authorized was to be issued under "Title 6 of the Code of Criminal Procedure." It was also specified in that same article that:

"No warrant shall be issued to search a private dwelling occupied as such . . . unless the affidavits of two credible persons show that such residence is a place where intoxicating liquor is sold or manufactured in violation of the terms of this act."

The legislature did not stop there but went further in that statute and expressly provided that the provisions of Title 6, C.C.P., should apply to the issuance of search warrants "except where otherwise provided in this title."

Such remained the law of this state touching search for and seizure of intoxicating liquors until 1935, when the legislature, in obedience to the repeal of state-wide prohibition, came on to pass the Liquor Control Act (Chap. 8, Vernon's Penal Code). By Art. 666-20 of that act (Vernon's P. C.), express provision was made

for the issuance of warrants to search for contraband liquor. It was there provided that a warrant to search for such liquor in a private residence must be based upon an affidavit "made by two (2) credible persons." There, again, it was expressly stated that said provision was an exception to the provisions of Title 6 of the Code of Criminal Procedure.

I am now and have always been convinced that when the legislature required that two persons make the affidavit to search a private residence for intoxicating liquor such legislation constituted a direct limitation upon Title 6 of the Code of Criminal Procedure so as to require that all warrants to search a private residence must be based upon the affidavit of two persons. The words appearing in Art. 666-20, Vernon's P.C.: "Except as herein provided the application, issuance, and execution of any such warrant and proceedings relative thereto shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure," require such a construction.

In my opinion there is another and equally compelling reason why the affidavit of two persons is now required for the issuance of a search warrant to search a private residence. That reason is that it is only by such construction that there exists equal and uniform legislation touching that subject.

It is discrimination, to the point of destruction to all statutes on the subject, to say that a warrant to search a private residence for intoxicating liquor must be based upon the affidavit of two persons, while a warrant to search the same residence for stolen property or for narcotics may issue upon the affidavit of but one person.

My views are set out in my dissenting opinion in the case of Helton,* Williams, and Gonzales, the latter being this day decided.

The search warrant in this case, issued upon the affidavit of but one person, was therefore illegal and in violation of constitutional guarantees.

It must be remembered that it is for the legislature to fix the procedure to be followed whereby a reasonable search of one's home might be accomplished.

If my brethren be correct in saying that the legislature has provided two sets of procedure, one to search for certain properties and another to search for other properties, then the legislature has not provided a procedure at all, as the purported procedures set forth are repugnant one to the other.

On the other hand, this situation and condition could and would be avoided by adopting my construction of the acts of the legislature, which is that by legislative enactment a warrant to search a private residence must be based upon the affidavit of two credible persons evidencing probable cause for the search.

So much as to the legality of the search warrant:

How was the search warrant executed, and what happened at the time of its execution? The officers held the search warrant for a period of thirty-six hours after its issuance and kept appellant's home under surveillance about fifteen hours over a two-day period before attempting to execute it: About 6:15 or 6:30 o'clock on the evening of the second day the officers had gone to the vicinity of appellant's home to continue their surveillance.

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*Helton v. State, 164 Tex. Cr. R. 488, 300 S. W. 2d 87; Williams v. State, ... Tex. Cr. R. ....., 314 S. W. 2d 308.

About 9:00 o'clock that night a telegraph messenger knocked at the door of her home. Appellant answered the knock, and a telegram was delivered to her. Immediately thereafter, the searching officers entered appellant's home and, after advising her that they were officers and had a search warrant, delivered the search warrant to her, and began a search of her home. They searched the apartment for about fifteen minutes without finding "anything of an unusual nature."

After the initial search, one George Owens entered the house, or apartment. When he had been there for a time, the officers found in a chair in the living room a cigarette containing marijuana. A conversation then ensued between appellant and one of the searching officers, in the course of which appellant said:

"If you won't put George Owens in jail I'll give you the rest of the marijuana."

Thereupon appellant withdrew from her bosom a bottle containing marijuana.

The state introduced an empty "Prince Albert" tobacco can and some cigarette papers.

That appellant was under arrest from the time the officers entered the apartment is conclusively established by the fact that they immediately identified themselves as officers and as being in possession of a search warrant to search the premises.

As before stated, the search warrant which authorized appellant's arrest was delivered to her.

Thus it is shown that all the incriminative evidence against appellant was obtained by the use and authority of the search warrant. Indeed, the statements, the act, and the conduct of the appellant were directly the result

of the search warrant while she was under arrest, all of which evidence was admitted over her objection.

Appellant did not testify. She sought by the testimony of another to show that the marijuana belonged to another person and that it had been left in her possession as an accommodation to that person.

This testimony explained the presence of the marijuana in appellant's home in keeping with and in a manner compatible with her innocence—that is, that she did not possess or exercise any ownership or control over the marijuana and that it belonged to another person.

The evidence did not show or admit that appellant possessed the marijuana found in her apartment, which possession was the offense for which she was tried and convicted.

Notwithstanding such fact, my brethren say that appellant should not be permitted to complain of the unlawful search of her home under a wholly and totally invalid warrant.

It has long been the established rule in this state that where illegal testimony is admitted, over objection, the error is not cured, because the defendant had to make the best of the situation and cross-examine on such matter or offer testimony to rebut, destroy, or explain the effect of such illegal testimony. Branch's P.C., 2d Edition, p. 134; Trollinger v. State, 153 Tex. Cr. R. 364, 219 S. W. 2d 1018; Willoughby v. State, 87 Tex. Cr. R. 40, 219 S. W. 468; Reynolds v. State, 82 Tex. Cr. R. 443, 199 S. W. 636.

That rule of law is not only legally correct, but it is correct as a matter of right and wrong.

So the time has come in this state when peace officers can kick in the door of one's home and search and ransack it at will and without any lawful authority to do so and in total disregard of the law, and the owner of that home, upon trial for possessing the property found therein, must submit to such outrage and deprivation of her constitutional right against unlawful search before she can show that she was innocent of any unlawful connection with the property so found.

If that is equal justice under law, I want no part of it. If a conviction obtained under such circumstances is due process of law, then there is no due process of law.

When the officers entered appellant's home, they either had the right or they did not have the right to do so. That they did not have that right is established. Hence their every act and the evidence so found were in direct contravention of the constitution guaranteeing one's home against unlawful search.

Those acts so proven were not admissible in evidence and the evidence so obtained was not admissible, being in violation of the Constitution of this state and of the United States and of Art. 727a, Vernon's C.C.P., which says that evidence unlawfully obtained shall not be admitted in evidence against an accused in the trial of any criminal case.

The unlawful search of appellant's home was perpetuated in the introduction of the evidence, all before appellant sought to introduce evidence explaining the presence of the marijuana in her home.

In affirming this conviction, my brethren necessarily sustain as a valid statute Sec. 16 of the Uniform Narcotic Drug Act, which authorizes a search warrant to issue upon belief, only, as against the contention that

it is repugnant to the Constitution of the United States, which authorizes a search warrant to issue only upon probable cause.

Such holding brings this case within the appellate jurisdiction of the Supreme Court of the United States.

If Sec. 16 is a valid statute and not repugnant to the Constitution of the United States, the Supreme Court of the United States should so hold; if Sec. 16 is repugnant to the Fourth Amendment to the Constitution of the United States, as I contend, that court ought to so hold.

Such suggestion is predicated upon the proposition that the appellant in this case exercises her right of appeal to that court for a determination of the validity of Sec. 16.

If it desires, the legislature can authorize, by statute, the search of one's home for marijuana so long as it does so within the limits prescribed by the Constitution of this state and that of the United States. The fact that it has not done so is not the fault of any other department of government.

It is the courts of this state and this nation that must preserve, protect, and defend our Constitutions and the rights, privileges, and freedoms guaranteed thereby.

When the courts fail in this duty and these guarantees are destroyed, constitutional government goes, too.

I respectfully dissent.

Davidson, *Judge*

(Delivered January 14, 1959.)

APPENDIX "B."

Judgment:

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that in Cause No. 30,043, styled,

JUANITA DALE PHILLIPS, *Appellant,*

vs.

THE STATE OF TEXAS, *Appellee,*

Judgment of the Criminal District Court of Dallas County was affirmed on January 14, 1959, by majority of the court (dissenting opinion by Judge Davidson); Appellant's Motion for Rehearing overruled, without written opinion, February 18, 1959; Appellant's Application for Leave to File Her Second Motion for Rehearing received and denied February 19, 1959, and order staying mandate to permit appellant to appeal to the Supreme Court of the United States or to seek a writ of certiorari from that Court was issued and filed February 19, 1959.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, appellant has exhausted all remedy in this, The Court of Criminal Appeals of Texas, and the Court of last resort of Texas in criminal cases, and said judgment has become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, on this 11th day of May, A. D. 1959.

GLENN HAYNES
Glenn Haynes
Clerk, Court of Criminal Appeals

APPENDIX C.

Section 16 of Article 725b of Vernon's Texas Penal Code (Acts 1937, p. 333, ch 169; Acts 1941, 47th Leg., p. 647, ch. 392, §§ 1, 2)

Whenever any officers or employee of the Department of Public Safety or any peace officer who has authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magistrate of the county in which such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative thereto, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act. Upon the execution of such search warrant the officer executing the same shall make due return thereof to the Court issuing the same, together with a sworn inventory of all narcotic drugs taken thereunder. The Court shall thereupon issue process against the person owning or controlling the narcotic drugs and upon return thereof it shall proceed to determine whether or not the same are held or possessed in violation of the provisions of this Act, and make up a finding to the effect that the drugs are so illegally held or possessed, a judgment shall be entered against the owner or person found in the possession of the same for the costs of the proceedings and provide for the disposition of the property forfeited, as provided by the terms hereof. In no event shall the narcotic drugs seized by any authorized person under authority of a search warrant or

without authority of a search warrant be taken from the custody of any officer or other person authorized to seize same, by writ of replevin or other process, but the same shall be held by the officer to await the final judgment in such criminal proceedings as may be had thereon.

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IN THE

Supreme Court of the United States

October Term, 1959
No. 124

JUANITA DALE PHILLIPS,

Petitioner,

vs.

THE STATE OF TEXAS.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas.

Application for Leave to File Supplemental Memorandum in Support of Petition for Writ of Certiorari; and Memorandum.

A. L. WIRIN.
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California.
JOE TONAHILL,
Tonahill Building,
Jasper, Texas,
MELVIN BELLI,
240 Stockton Street,
San Francisco, California.
JULIUS LUCIUS ECHELES,
33 North La Salle,
Chicago 2, Illinois.
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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Application for Leave to File Supplemental Memorandum in Support of Petition for Writ of Certiorari.

Subsequent to the filing of the Petition for Writ of Certiorari herein, counsel for petitioner have had an opportunity to see the brief for petitioner in *Rios v. United States*, No. 52, October Term, 1959 in this Court and the jurisdictional statement in *Eaton v. Price*, No. 30, October Term, 1959, in this Court.

While those cases are different from the instant case,[1] there are considerations in both those cases of sufficient

[1] *Eaton v. Price* is not too different. Although the precise question before this Court is the validity of a municipal ordinance which allows health inspection without a warrant, broadly speaking, it can be said that the whole subject of the admissibility of illegally obtained evidence in a state court, and its relationship to the Fourteenth Amendment is also involved.

relationship to this one—considerations felt important enough for this Court to grant hearings (27 L. W. 3293 and 3348)—as to make it appropriate, in our judgment, to point them out as additional reasons for certiorari to be granted herein.

Accordingly, application is made for leave to file the memorandum attached hereto.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Joe Tonahill,
Melvin Belli,
Julius Lucius Echeles,
Attorneys for Petitioner.

IN THE

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Supplemental Memorandum in Support of Petition for Writ of Certiorari.

In the jurisdictional statement in *Eaton v. Price* (No. 699, Oct. Term, 1958; now No. 30, Oct. Term, 1959), page 13, footnote 5, the following appears:

"Appellant expects, if granted a hearing on the merits of this appeal, to present and argue this important question.[1] While the issue may be considered by many to be closed (*Wolf v. Colorado, supra*), respectable opinion to the contrary seems to exist. (See dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 68, and

[1]The text to this footnote reads:

"Aside from the question whether the Fourth Amendment should be given effect against the State in the circumstances of the instant cause,[5] . . ."

opinions in *Wolf v. Colorado, supra*, of Mr. Justice Black (338 U. S. 25, 40), concurring, and Mr. Justice Rutledge [338 U. S. 25, 47], dissenting.)"

As seen, this Court noted probable jurisdiction (27 L. W. 3348). Accordingly, if the question of the direct applicability of the Fourth Amendment to the States is to be considered by this Court, the granting of certiorari in the instant case would seem indicated, for, in that event, it is the more clear that petitioner's constitutional right to freedom from unreasonable searches and seizures was violated.

The considerations which led this Court to grant certiorari (27 L. W. 3293) in *Rios v. United States* (No. 854, Oct. Term, 1958; now No. 52, Oct. Term, 1959), are we believe, likewise present in the instant case. While it is true that the *Rios* case has to do with the admissibility in the Federal courts of evidence illegally obtained by State officers, the granting of certiorari in that case evidences this Court's continuing concern with the problems inherent in federalism (*cf. Bartkus v. Illinois*, 359 U. S. 121; *Abbate v. United States*, 359 U. S. 187). In reality, the instant case is but another facet of the problem present not only in the *Rios* case, but also that present in *Rea v. United States*, 350 U. S. 214. In the latter case, this Court held that a federal officer who obtained evidence illegally should be enjoined from testifying thereto in the State court. In the case at bar, the dignity and purity of federal authority is equally present in the form of the Texas statute which prohibits the receipt of evidence ob-

tained in violation of the Constitution of the United States. This being so, the question is of sufficient importance to warrant a hearing by this Court.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
JOE TONAHILL,
MELVIN BELLI,
JULIUS LUCIUS ECHELES,
Attorneys for Petitioner.

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vs.

THE STATE OF TEXAS,

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas.

PETITION FOR REHEARING.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
JOE TONAHILL,
Tonahill Building,
Jasper, Texas,
MELVIN BELLI,
240 Stockton Street,
San Francisco, California,
JULIUS LUCIUS ECHELES,
33 North La Salle Street,
Chicago 2, Illinois,
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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IN THE

Supreme Court of the United States

October Term 1959.
No. 124.

JUANITA DALE PHILLIPS,

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vs.

THE STATE OF TEXAS,

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas.

PETITION FOR REHEARING.

Pursuant to Rule 58(2) of this Court petitioner respectfully prays for a rehearing of the order denying the petition for writ of certiorari herein.[1]

The ground for rehearing is that although in her petition (p. 14, f.n. 7) petitioner suggested that this might be an appropriate case and time for the *Wolf v. Colorado* doctrine (338 U. S. 25) to be reconsidered,[2] she did not directly urge upon the Court that her petition be granted

[1]The petition for writ of certiorari was denied on October 12, 1959.

[2]Reference was also made in the Supplemental Memorandum in Support of the Petition (p. 3) to the statement regarding the applicability of the Fourth Amendment to the States appearing in footnote 5, page 13 of the jurisdictional statement in *Eaton v. Price*, No. 30, Oct. Term, 1959 (No. 699, Oct. Term, 1958).

for the express purpose of overruling that case. She does so now.

Cases subsequent to *Wolf v. Colorado,* particularly *Frank v. Maryland,* 359 U. S. 360, have so obscured the line separating the Fourth Amendment from the Fourteenth Amendment that it would appear appropriate for the Court to now lay down the rule in the more explicit terms of the Fourth rather than in the more general terms of the Fourteenth.

In *Frank v. Maryland,* five of the justices of this Court felt that the Fourth Amendment applied directly to the States through the Fourteenth Amendment. Thus, the dissenting justices said (359 U. S. at 374): "The Due Process Clause of the Fourteenth Amendment enjoins upon the States the guarantee of privacy embodied in the Fourth Amendment . . ." The concurring justice said (359 U. S. at 373): "The core of the Fourth Amendment prohibiting unreasonable searches applies to the States through the Due Process Clause of the Fourteenth Amendment," and *(ibid.)* "I understand the Court's opinion to adhere fully to that principle." Even the Court's opinion blurred the Fourth Amendment and the Due Process clause of the Fourteenth. For, after reiterating the language of *Wolf v. Colorado,*[3] the Court relied for explanation upon the historical facts leading up to the adoption of the Fourth Amendment and then concluded by saying (359 U. S. at 365-366):

> ". . . . While these concerns for individual rights were the historic impulses behind the Fourth Amend-

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[3](359 U. S. at 362-363): "'(T)he security of one's privacy against arbitrary intrusion of the police' is fundamental to a free society and as such protected by the Fourteenth Amendment."

ment and its analogies in the state constitutions, the application of the Fourth Amendment *and* the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds." (Italics added.)

It appears, therefore, that no real purpose is being served by maintaining on paper that there is a distinction between the Fourth Amendment and the Due Process Clause of the Fourteenth.[4] At best, the distinction is theoretical; in reality it is non-existent. The Court should, therefore, overrule *Wolf v. Colorado* and hold squarely that the Fourth Amendment guaranty applies directly to the States through the Due Process clause of the Fourteenth (*Cf. Gitlow v. New York*, 268 U. S. 652, 666).

Conclusion.

Rehearing and the petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
JOE TONAHILL,
MELVIN BELLI,
JULIUS LUCIUS ECHELES,
Attorneys for Petitioner.

[4]Speaking, of course, of the application of the Due Process Clause to the protection of the right of privacy.

Certificate of Counsel.

I certify that the within Petition for Rehearing is presented in good faith and not for delay and that the petition is restricted to a substantial ground available to petitioner although not previously presented.

FRED OKRAND.